IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-619

UTAH POWER & LIGHT COMPANY, ET AL., *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on August 2, 1976.[1]

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[1] This petition is filed on behalf of Utah Power & Light Company, the principal electric public utility in Utah, petitioner in No. 75-1369 below; Public Service Company of Colorado, a public utility operating within Colorado; Colorado-Ute Electric Association, Inc., a cooperative association of public utilities in Colorado and Arizona; Platte River Power Authority, an electric power authority owned and operated by certain Colorado cities; and Cheyenne Light, Fuel and Power Company, a wholly-owned subsidiary of Public Service Company of Colorado providing electric services in Wyoming, petitioners in No. 75-1368 below.

OPINION BELOW

The opinion of the Court of Appeals has not yet been officially reported, but is unofficially reported at 9 ERC 1129 (Appendix A).[2] That opinion reviewed regulations promulgated by the Environmental Protection Agency as amendments to state implementation plans under the Clean Air Act, which were published in the Federal Register, together with an explanatory preamble on December 5, 1974 (39 Fed. Reg. 42509), and were revised on January 16, 1975 (40 Fed. Reg. 2802), June 12, 1975 (40 Fed. Reg. 25004) and September 10, 1975 (40 Fed. Reg. 42011). The regulations thus promulgated amended Part 52 of 40 C.F.R. (Appendix B).

JURISDICTION

The judgment of the Court of Appeals (Appendix C) was entered on August 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency has authority, under the Clean Air Act, to promulgate regulations amending state plans for implementation of the established national ambient air quality standards so as to include provisions for prevention of significant deterioration in areas where the air quality is already better than is required to comply with those standards.

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[2] A petition for certiorari was recently filed in this proceeding on behalf of several other petitioners below and has been assigned No. 76-529. This petition adopts as its own the following appendices to the petition in No. 76-529: Appendices A, B, C, and E. Hereinafter, unless otherwise indicated, all references to the Appendices will be to those appended to No. 76-529.

2. Assuming that the Environmental Protection Agency does have such authority, whether the significant deterioration regulations which it has promulgated violate the Clean Air Act, because they grant to federal land managers and Indian governing bodies the power to reclassify federal and Indian lands, which may impose more stringent air quality limitations upon adjoining state and private lands 60 or more miles from federal or Indian lands in derogation of the states' primary responsibility under the Clean Air Act.

3. Whether the issue of the Environmental Protection Agency's statutory authority to grant such reclassification powers to federal land managers and Indian governing bodies by promulgation of regulations amending state implementation plans is ripe for review under Section 307(b)(1) of the Clean Air Act.

STATUTE AND REGULATIONS INVOLVED

Section 307(b), 42 U.S.C. § 1857h-5(b), of the Clean Air Act, *as amended,* provides, in pertinent part:

> (1) . . . A petition for review of the Administrator's action in . . . promulgating any implementation plan under section 110 of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, . . . or after such date if such petition is based solely on grounds arising after such 30th day.
>
> (2) Action of the Administrator with respect to which review could have been obtained under

paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

Other relevant provisions of the Clean Air Act, *as amended*, 42 U.S.C. § 1857 *et seq.*, are set forth in Appendix E to the petition for writ of certiorari in No. 76-529. The regulations being reviewed, 40 C.F.R. §§ 52.01(d), (f), and 52.21 (1975), *as amended*, 40 Fed. Reg. 42011 (September 10, 1975) are set forth in Appendix B to the petition in No. 76-529.

STATEMENT OF THE CASE

Petitioners adopt as their own the Statement of the Case set forth in No. 76-529.

REASONS FOR GRANTING THE WRIT

Petitioners adopt as their own the reasons advanced in the petition in No. 76-529, which focuses on the basic issue of EPA's authority under the Clean Air Act, *as amended, to* promulgate regulations amending state implementation plans so as to include provisions for the prevention of significant deterioration of air quality that is better than national ambient air quality standards. This Court previously granted certiorari on that fundamental statutory issue in *Sierra Club* v. *Ruckelshaus*, 409 U.S. 1124 (1973), which resulted in affirmance by an equally divided court, *Fri* v. *Sierra Club*, 412 U.S. 541 (1973).

Should this Court conclude that EPA is authorized to promulgate regulations amending state implementation plans so as to require the prevention of significant deterioration, another issue must be resolved. That issue is whether such regulations may empower federal land managers and Indian governing bodies to reclas-

sify federal and Indian lands, which has the operative effect of impinging upon the sovereign states' primary responsibility under the Clean Air Act for controlling air quality throughout their entire geographic areas. The lower court declined to review this important issue believing it is not ripe for review. The lower court's interpretation of the review provisions of the Clean Air Act is clearly contrary to the express provisions of the Act and, if permitted to stand, will foreclose petitioners from obtaining a decision on the merits of an important and far-reaching delegation of authority by EPA to federal land managers and Indian governing bodies.

A. The Clean Air Act and Recent Decisions of This Court Firmly Establish that the States Have Primary Responsibility for Controlling Air Quality Throughout Their Entire Geographic Areas.

The Clean Air Act declares in Section 101(a)(3), 42 U.S.C., § 1857(a)(3) that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments. . . ." Section 107(a), 42 U.S.C. § 1857c-2(a), provides that "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . ."

On three occasions since its equally divided affirmance of *Fri* v. *Sierra Club,* 412 U.S. 541 (1973), this Court has noted that Congress, in passing the Clean Air Act Amendments of 1970, "explicitly preserved the principle that, 'Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . .'." *Train* v. *Natural Resources Def. Council,* 421 U.S. 60, 64 (1975); *Hancock* v. *Train,* — U.S. —, 96 S.Ct. 2006, 2008

(1976); *accord, Union Electric Company* v. *E.P.A.*, — U.S. —, 96 S.Ct. 2518, 2525 (1976).

Although this Court held (Justices Stewart and Rehnquist dissenting, 96 S.Ct. at 2022), that Section 118 does not require existing federal installations to obtain state permits in order to continue operations, it acknowledged that Section 118 of the Clean Air Act, 42 U.S.C. § 1857f, "makes it the duty of federal facilities to comply with *state-established* air quality and emission standards." *Hancock* v. *Train, supra,* 96 S. Ct. at 2014 (emphasis supplied).

B. Contrary to the Explicit Provisions of the Act and This Court's Holdings, the Administrator Has Abrogated the States' Responsibilities To Assure Air Quality Throughout Their Entire Geographic Areas.

Federal land managers and Indian governing bodies are permitted by the regulations to redesignate their lands independently of state control and in a manner inconsistent with surrounding state designations 40 C.F.R. § 52.21(c)(3)(iv) and (v) (1975) (App. B, 80a). Federal land managers may only redesignate to a more restrictive classification; that is, from a Class II to a Class I designation § 52.21(c)(3)(iv). Indian governing bodies may redesignate to either Class I or Class III § 52.21(c)(3)(v).

The Administrator has recognized that the power to reclassify to a Class I designation means the power to control land use "60 or more miles" outside the Class I area:

> [B]ecause of the small air quality increments specified for Class I areas, these levels can be violated by a source many miles inside an adjacent Class II or III area. For example, a power plant which just meets the Class II increment for SO_2

> could under some conditions violate the Class I increment for SO_2 60 or more miles away. Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, *the potential growth restrictions, especially for power plant development, extends well beyond the Class I boundaries into the adjacent areas.* . . . [I]t should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, *allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.* 39 Fed. Reg. 42512 (Dec. 5, 1974) (emphasis supplied) (App. B, 66a-67a).

There is nothing in the Act or its legislative history to support granting either federal land managers or Indian governing bodies power to "dictate" the use of state and private lands in this fashion. EPA's only justification for this extraordinary grant of authority is that "[t]here is nothing in the Clean Air Act or the legislative history of that Act that indicates the Congress intended to preclude the Federal Government from meeting more restrictive standards than are imposed by the States" 39 Fed. Reg. 42513 (Dec. 5, 1974) (App. B, 70a). That argument does not answer, it begs, the issue whether the Act authorizes EPA to grant federal land managers and Indian governing bodies effective veto power over the air pollution control strategies chosen by the respective states. The differences are not semantical—they are quite real, especially in the Western states where federal land ownership is extensive. As shown by Bureau of Land

Management, *Public Land Statistics,* Table 7, 1975, the total federal acreage and percentage of federal land within the four states comprising petitioners' service area is as follows:

State	Federal Acreage	Federal Lands as Percentage of State
Utah	34,882,460	66%
Colorado	23,973,450	36%
Wyoming	29,927,861	48%
Idaho	33,732,820	64%

Moreover, with federal land scattered throughout a state, federal land managers' power to "dictate" large portions of state and private lands usage intensifies; indeed, in Utah, there is *no* point on private or state land that is farther than *20* miles from an adjoining federal or Indian border.

The practical effect is that states such as Utah, Colorado, Wyoming and Idaho are divested to a large extent of their responsibility to control air quality within their borders. At best, their control is concurrent with federal land managers and Indian governing bodies. At worst, they are now relegated to a secondary role in controlling air quality.

There is no statutory or judicial support for such an abrogation of state responsibility under the Clean Air Act. The Act is explicit in expressing Congress' intent that states maintain control of their land uses in achieving national air quality standards. *Train* v. *Natural Resources Def. Council, supra* at 86-87. The Administrator's grant of power to federal land managers and Indian governing bodies contravenes that Congressional intent.

C. Whether EPA Is Authorized To Grant Reclassification Powers to Federal Land Managers and Indian Governing Bodies Is a Matter Ripe for Review Under Section 307(b)(1) of the Clean Air Act, as Amended.

Congress created for the Clean Air Act its own judicial review procedures. In § 307(b)(1), 42 U.S.C. 1857h-5(b)(1), Congress established a 30-day statutory limitation period for the filing of a petition to review the Administrator's action in promulgating any implementation plan. This is in keeping with Congress' intent under the Clean Air Act Amendments of 1970, which "imposed upon the Agency and states a comprehensive planning task of the first magnitude which was to be accomplished in a relatively short time." *Train* v. *Natural Resources Def. Council*, *supra* at 68.

The court below disregarded § 307(b)(1), refusing to decide whether the Administrator had exceeded his statutory authority in granting federal land managers and Indian governing bodies the power to redesignate their lands, finding this issue "not yet ripe for review." (App. A, 47a). Review by this Court is necessary in order to affirm the intent of Congress and to resolve promptly *all* questions raised concerning the Administrator's authority to promulgate the regulations.

As the lower court correctly recognized, the challenged regulations were promulgated by the Administrator pursuant to section 110(c)(1), 42 U.S.C. §1857c-5(c)(1), as amendments to the state implementation plans (App. A, 11a). Each state implementation plan was amended to incorporate by reference the new regulations (*Id.*). Judicial review of the promulga-

tion of any state implementation plan is provided in section 307(b)(1):

> A petition for review of the Administrator's action in . . . promulgating any implementation plan under section 110 of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition *shall be filed within 30 days from the date of such promulgation,* . . . or after such date if such petition is based *solely on grounds* arising after such 30th day. 42 U.S.C. § 1857h-5(b)(1) (emphasis supplied).

And § 307(b)(1) is the exclusive means for obtaining judicial review of the promulgation of any state implementation plan. *Highland Park* v. *Train,* 519 F.2d 681 (C.A. 7, 1975), *cert. denied,* — U.S. —, 96 S.Ct. 1141 (1976); *Plan for Arcadia* v. *Anita Associates,* 501 F.2d 390, 392 (C.A.9), *cert. denied,* 419 U.S. 1034 (1974); *Getty Oil* v. *Ruckelshaus,* 467 F.2d 349 (C.A. 3, 1972), *cert. denied,* 409 U.S. 1125 (1973).

Failing to realize the exclusivity of judicial review of implementation plans under § 307(b)(1), the lower court declined to decide whether the Administrator possesses authority to delegate reclassification powers to federal land managers and Indian governing bodies, finding it not yet ripe for review (App. A, 47a). This conclusion is based on the erroneous assumption that judicial review of the Administrator's power to amend state implementation plans could be obtained at some later date. But, as this Court recently pointed out, under § 307(b)(1), petitions for review of an implementation plan may be filed more than 30 days after promulgation of such implementation plan "*only* if the petition is 'based *solely* on grounds arising after

such 30th day' " *Union Electric Co.* v. *E.P.A.*, — U.S. —, 96 S.Ct. 2518, 2523 (1976) (emphasis supplied).

Petitioners' failure to seek judicial review of the regulations within 30 days of their promulgation would have precluded them from challenging the Administrator's statutory authority to promulgate the regulations. Land reclassification at some future date by a federal land manager or Indian governing body—the "more concrete context" the lower court referred to (App. A, 48a)—would not enable petitioners to obtain review of the Administrator's *authority* to delegate those powers, since a challenge to that authority would not be "based *solely* on grounds arising after such 30th day," as required by § 307(b)(1).

In *Brown* v. *Environmental Protection Agency*, 521 F.2d 827 (C.A.9, 1975), *cert granted*, 44 U.S.L.W. 3681 (June 1, 1976), EPA made an argument similar to that which it advanced in the court below in this case. The State of California challenged the Administrator's authority under the Clean Air Act to impose any sanctions or penalties against California for its failure to administer and enforce transportation controls set out in the State's implementation plan. EPA there argued that a determination regarding the Administrator's authority was not yet ripe because the Administrator had yet to institute procedures necessary to invoke the sanctions. The court rejected that argument stating:

> *We do not believe any doctrine of ripeness* or exhaustion of administrative remedies *should preclude our determination of the issues* raised in this proceeding by the State of California and others *regarding the authority to impose the regu-*

> *lations with respect to which these petitions for review were filed.* Such issues must be determined in this proceeding for it is unlikely they could be raised 'in a civil or criminal proceeding for enforcement.' Moreover, the orderly administration of the Clean Air Act requires that the serious questions to which the parties have addressed themselves be resolved as expeditiously as possible.[3] (*Id.* at 831, emphasis supplied).

Similarly, the court below should not have refrained from deciding whether the Administrator exceeded his statutory authority. Section 307(b)(1) left no discretion to either petitioners or the court. Petitioners were required to file their petition for review within 30 days of the regulations' promulgation, and the court, having correctly concluded that the validity of EPA-promulgated state implementation plans was at issue (App. A, 11a), was required to grant judicial review.

The lower court's reliance on *Toilet Goods Ass'n, Inc.* v. *Gardner,* 387 U.S. 158 (1967), is misplaced (App. A, 47a). This Court found the particular issue in *Toilet Goods* not yet ripe for review *only* after having satisfied itself that, under the *Administrative Procedure Act,* petitioners would be afforded at a later date effective judicial review with respect to the issue of the underlying statutory authority to promulgate the challenged regulations (*Id.* at 165-66). But, as *Getty Oil Co.* v. *Ruckelshaus,* 467 F.2d 349, 356 (C.A. 3, 1972), *cert. denied* 409 U.S. 1125 (1973), made clear, "The Declaratory Judgment Act and APA could not afford a basis for jurisdiction" of a challenge to the

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[3] EPA did not seek certiorari on this issue. *Environmental Protection Agency* v. *Brown,* Petition for a Writ of Certiorari, No. 75-909.

promulgation of an implementation plan because Congress in § 307(b)(1) of the Clean Air Act provided an exclusive method for judicial review of state implementation plans.

Moreover, the lower court's inability to "foresee any irreparable injury which may arise from deferral" of the question whether the Administrator exceeded his authority in granting the classification powers to federal land managers and Indian governing bodies is quite beside the point (App. A, 48a). Congress nowhere provided in the Clean Air Act of 1970 that petitions for review of the Administrator's promulgation of implementation plans must demonstrate "irreparable injury." Indeed, since petitioners can not later mount a challenge to the Administrator's lack of statutory authority to promulgate the amended state implementation plans, it is the refusal of the lower court to decide the issue that will inflict "irreparable injury" on petitioners by forever foreclosing judicial review on this issue.

Finally, the lower court further justified its refusal to review the issue with the following hypothesis:

> If the Administrator were to approve, as replacements for these regulations, individual state plans which did not include the powers granted to federal land managers and Indian governing bodies, the problems foreseen by petitioners might never arise. (App. A, 48a).

At no time has the Administrator suggested that he might approve state plans which did not include the reclassification powers which he granted to federal land managers and Indian governing bodies. Quite to the

contrary, the Administrator declared in the preamble to the regulations:

> EPA did not intend to preclude State redesignations *provided that the Federal Land Manager can elect to keep the air quality over Federal lands in a more pristine condition than the State might designate.* Therefore, the regulations . . . reserve to the Federal Land Manager the authority to subject such lands to a more stringent designation . . . . [T]he revised regulations make it clear that the Federal Government can protect air quality over all Federal lands. 39 Fed. Reg. 42513 (Dec. 5, 1974) (emphasis supplied) (App. B, 69a-70a).

The lower court has thus refused to decide an important issue, and has as well erroneously decided other significant issues concerning the Administrator's authority under the Clean Air Act, which this Court should review and decide.

CONCLUSION

For the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 1, 1976

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APPENDIX F

The following parties were other petitioners in the consolidated proceedings below:

Montana Power Company, Pacific Power and Light Company, Portland General Electric Company, Puget Sound Power & Light Company, Washington Water Power Company, Pacific Coal Gasification Company, Transwestern Coal Gasification Company, The Dayton Power and Light Co., Kentucky Power Company, Ohio Edison Company, Ohio Power Company, Cincinnati Gas & Electric Company, The Cleveland Electric Illuminating Company, Columbus and Southern Ohio Electric Company, Sierra Club, The Washington Metropolitan Coalition for Clean Air, New Mexico Citizens for Clean Air and Water, Oregon Environmental Council, Sally Rodgers, John Tanton, Susan L. Moore, Stephen Winter, the State of New Mexico, the State of Nevada, Buckeye Power, Inc., Ohio Valley Electric Corporation, Indiana-Kentucky Electric Corporation, Indiana & Michigan Electric Corporation, Indiana Statewide Rural Electric Cooperative, Inc., Indianapolis Power and Light Company, Northern Indiana Public Service Company, Public Service Company of Indiana, Inc., Southern Indiana Gas and Electric Company, Utah International, Inc., Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Western Energy Supply and Transmission Associates, Arizona Public Service Company, Arizona Power Cooperative, Inc., Nevada Power Company, Salt River Project Agricultural Improvement and Power District, San Diego Gas & Electric Company, Southern California Edison Company, Edison Electric Institute, the Kentucky Utilities Company, American Petroleum Institute, Standard Oil Company, Atlantic-Richfield Company, Continental Oil Company, Exxon Corporation, Gulf Oil Corporation, Mobil Oil Corporation, Shell Oil Corporation, Texaco, Inc., Tucson Gas & Electric Company, and Union Oil Company of California.

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No. 76-620

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE STATE OF UTAH AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE STATE OF UTAH AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

The State of Utah, appearing by its undersigned Attorney General, respectfully tenders this brief as *amicus curiae* for the consideration of the Court in support of the petitions for writs of certiorari in Nos.

76-619 and 76-620. The State supports the position presented therein and urges this Court to grant the petitions for writs of certiorari.

THE INTEREST OF THE STATE OF UTAH

The State of Utah is directly affected by the decision of the court below. With the exceptions of Alaska and Nevada, federal land ownership is more extensive in the State of Utah than in any other state. Under the prevention of the significant deterioration regulations, the State of Utah is deprived of its primary responsibility under the Clean Air Act to control ambient air quality within its boundaries. Specifically, 40 C.F.R. § 52.21(c)(3)(iv) (1976) of the regulations has the effect of delegating control of all lands within the State to federal land managers. Thus, Utah's ability to control its land use and economic development is substantially impaired, if not abrogated. For this reason, the Court should grant the petitions for writs of certiorari to determine the validity of § 52.21 (c)(3)(iv) of the regulations.

The court below declined to decide the validity of § 52.21(c)(3)(iv). If allowed to stand, the regulation would seriously interfere with the State's execution of the air quality management responsibilities vested in it by Congress. Moreover, the decision poses a threat to the economic development of substantial areas within the State of Utah. The State has a clear interest in seeking reversal of the decision below.

REASONS FOR GRANTING THE WRIT

The Clean Air Act from its inception in 1955 (69 Stat. 322-323), has preserved the right of each state to control its air quality. *Train* v. *Natural Resources*

Def. Council, 421 U.S. 60, 63-64 (1975). Section 52.21 (c)(3)(iv) of the significant deterioration regulations permits federal land managers to redesignate federal lands to a more restrictive classification independent of state control. This has the operative effect of depriving the State of Utah of its powers and responsibilities under the Clean Air Act. Thus, § 52.21(c)(3)(iv) is, in effect, an amendment to the Clean Air Act, rather than a regulation pursuant to the Act.[1]

The lower court declined to determine the validity of § 52.21(c)(3)(iv) holding it not yet ripe for review. Under the explicit provisions of the Clean Air Act the issue of the validity of § 52.21(c)(3)(iv) is ripe for review. Moreover, § 52.21 (c)(3)(iv) has a real and immediate impact on Utah's ability to regulate its air quality.

A. The States Have the Primary Responsibility for Assuring Air Quality Within Their Geographic Areas.

Throughout the history of the Clean Air Act, Congress has preserved the basic principle "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." Section 101(a)(3), 42 U.S.C. § 1857(a)(3); *Train* v. *Natural Resources Def. Council*, 421 U.S. 60, 64 (1975). Section 107(a), 42 U.S.C. § 1857c-2(a), provides that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . ." This Court recently reaffirmed the principle of State respon-

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[1] The 94th Congress had before it a bill to amend the Clean Air Act that would have given federal land managers authority similar to that provided in the regulations. S. 3219, 94th Cong., 2d Sess. (1976). The bill failed to pass into law.

sibility in *Hancock* v. *Train*, — U.S. —, 96 S.Ct. 2006 (1976) and *Union Electric Co.* v. *E.P.A.*, — U.S. —, 96 S.Ct. 2518 (1976).

Senator Muskie, a major proponent of the 1970 amendments to the Clean Air Act, presented to the Senate the Conference Committee's report amending the Act and discussed the importance of State control:

> I have been very much interested in preserving 'local option' features so that *State and local authorities would be able to pursue options among a broad array, seeking a possible way of controlling or preventing air pollution that is most responsive to the nature of their air pollution problem and most responsive to their needs.* In my judgment, the bill will give State and local authorities sufficient latitude in selecting ways to prevent and control air pollution. Senate Committee on Public Works, 93d Cong., 2d Sess., A Legislative History of the Clean Air Amendments of 1970, 137 (Comm. Print 1974) (emphasis supplied).

Section 52.21(c)(3)(iv) deprives the State of Utah from controlling and preventing air pollution contrary to explicit provisions of the Act, decisions of this Court, and Congressional intent.

B. The Regulations Have the Operative Effect of Divesting the State of Utah of Control Over Its Ambient Air Quality.

Section 52.21(c)(3)(iv) grants federal land managers the authority to independently reclassify federal lands to the more restrictive Class I designation. Federal lands comprise 66 percent of the total lands in the State of Utah.[2] Moreover, the checkerboard

[2] Bureau of Land Management, *Public Land Statistics* 10 (1975).

ownership pattern of the federal lands in Utah is such that there is no private or State land that is farther than twenty miles from federal lands. This enables federal land managers to be able to control *all* of the lands within the State. This result was acknowledged by the Administrator in his discussion of the regulations:

> [B]ecause of the small air quality increments specified for Class I areas, these levels can be violated by a source located many miles inside an adjacent Class II or III area. For example, a power plant which just meets the Class II increment for SO_2 could under some conditions violate the Class I increment for SO_2 60 or more miles away. Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, *the potential growth restrictions . . . extends well beyond the Class I boundaries into adjacent areas* . . . . [I]t should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment. 39 Fed. Reg. 42512 (Dec. 5, 1974) (emphasis supplied) (App. B, 66a-67a).[3]

Federal land managers can thus exercise primary control over Utah lands contrary to the history of the Clean Air Act, the Act itself, and decisions of this

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[3] Reference is to the appendix in *Montana Power Company* v. *United States Environmental Protection Agency*, No. 76-529, a related petition for a writ of certiorari in this proceeding.

Court. The State of Utah, at best, is left with only secondary responsibility for managing the quality of ambient air within its borders.

C. Section 52.21(c)(3)(iv) of the Regulations Is Ripe for Judicial Review Under Section 307(b)(1) of the Clean Air Act.

The lower court declined to determine the validity of § 52.21(c)(3)(iv) deciding that the issue was not yet ripe for review. In reaching this conclusion, the lower court relied upon *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967), a case involving judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* Although the State believes that the issue is ripe for review even under the principles laid down in *Toilet Goods, supra*, judicial review in this proceeding is governed by § 307(b)(1), 42 U.S.C. § 1857h-5(b)(1), of the Clean Air Act. Accordingly, under § 307(b)(1), the lower court should have determined the validity of § 52.21(c)(3)(iv) of the regulations.

Section 307(b)(1) provides that,

> A *petition for review* of the Administrator's action in . . . promulgating *any implementation plan under section 110* of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition *shall be filed within 30 days from the date of such promulgation*, . . . or after such date if such petition is based solely on grounds arising after such 30th day. (emphasis supplied).

The regulations were promulgated pursuant to § 110(*c*), 42 U.S.C. § 1857c-5(c) (App. B, 74a) and have been incorporated by reference into the State of Utah's § 110 implementation plan, 40 C.F.R. §52.2346 (1976).

As § 307(b)(1) is the exclusive jurisdictional basis to review the promulgation of any state implementation plan, *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C. Cir. 1975); *City of Highland Park* v. *Train*, 519 F.2d 681 (7th Cir. 1975), *cert. denied*, — U.S. —, 96 S.Ct. 1141 (1976); *Plan for Arcadia, Inc.* v. *Anita Associates*, 501 F.2d 390 (9th Cir. 1974), *cert. denied*, 419 U.S. 1034 (1974); *Getty Oil Company (Eastern Operations)* v. *Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the lower court was required to determine the validity of § 52.21(c)(3)(iv) of the regulations.

The Act explicitly directs that any petition to review the promulgation of a state implementation plan is to be filed within 30 days of the promulgation. Failure to file within 30 days precludes any subsequent challenge to the implementation plan unless "the petition is 'based solely on grounds arising after such 30th day.'" *Union Electric Co.* v. *E.P.A.*, — U.S. —, —, 96 S.Ct. 2518, 2523 (1976).

The issue of the regulation's validity is purely legal; further delay in resolving the issue is not in the public interest. To the contrary, the regulation has an immediate impact on Utah's authority and ability to control its air quality. Section 52.21(c)(3)(iv) fundamentally alters the federal-state relationship so carefully written into the Clean Air Act. The matter is ripe for review, and should be resolved to remove the cloud over Utah's primary responsibilities under the Clean Air Act, so that the State may effectively pursue its sovereign rights and duties as contemplated by Congress and as recognized by this Court.

CONCLUSION

For the foregoing reasons, the State of Utah as *amicus curiae* urges this Court to grant the petitions for writs of certiorari.

Respectfully submitted,

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